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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

Nos. 72-549 and 72-550

RICHMOND SCHOOL BOARD, *et al.*,

Petitioners,

—v.—

THE STATE BOARD OF EDUCATION OF THE COMMONWEALTH OF VIRGINIA, *et al.*,

Respondents.

CAROLYN BRADLEY, *et al.*,

Petitioners,

—v.—

THE STATE BOARD OF EDUCATION OF THE COMMONWEALTH OF VIRGINIA, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF AMERICAN CIVIL LIBERTIES UNION AND AMERICAN CIVIL LIBERTIES UNION OF VIRGINIA, *AMICUS CURIAE*

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RIEF OF AMERICAN CIVIL LIBERTIES UNION AND AMERICAN CIVIL LIBERTIES UNION OF VIRGINIA, *AMICUS CURIAE*

Interest of *Amicus Curiae*

The American Civil Liberties Union and the ACLU of Virginia have secured the consent of the parties to the filing of the attached brief *amicus curiae*. The letters of consent have been filed with the Clerk.

The American Civil Liberties Union is a nation-wide non-partisan organization of over 180,000 members dedicated solely to preservation of the liberties safeguarded by the Bill of Rights and the 13th, 14th and 15th Amendments to the United States Constitution. The American Civil Liberties Union of Virginia is a state affiliate of the ACLU.

The ACLU and the ACLU of Virginia have been particularly concerned with the pervasive effects of racial discrimination and segregation on American society. They participate in numerous law suits challenging racial discrimination and segregation. They take the position that effective racial integration of the public schools is a necessary prerequisite to the full and equal protection of the laws for Americans of all races and colors.

In this brief, the ACLU and the ACLU of Virginia provide additional focus on the issues in this case which go well beyond the facts of the particular case. They hope thereby to place these issues in the larger perspective.

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ARGUMENT

This latest aspect of an old school desegregation suit involves the equitable powers of the federal courts to give full and meaningful relief against the continued effects of *de jure* school segregation. Within its record, the case presents questions concerning the power of federal courts to fashion remedies that consolidate school systems that are separated by lines drawn by state government to secure non-education interests. For in this case, the petitioners were ordered by the District Court below to consolidate, for the purpose of creating a unitary integrated school system, the effectively segregated separate school systems of the City of Richmond and the adjacent Chesterfield and Henrico counties. The Court of Appeals reversed. In this brief we take the position that the decision of the District Court was eminently sound—indeed it is required by the principles contained in decisions of this Court—and it should be reinstated.

I.

The children of metropolitan Richmond are denied equal educational opportunity because their schools are racially segregated.

"Separate educational facilities are inherently unequal." *Brown* v. *Board of Education*, 347 U.S. 483, 495 (1954). "To separate [black students] . . . generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone. . . . Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental

development of Negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system." *Id.* at 494.

We submit that at the heart of the *Brown* principle is what Edmund Cahn once labeled as the "consumer perspective," Cahn, *Law in the Consumer Perspective*, 112 U. PA. L. REV. 1 (1963); Cahn, *The Predicament of Democratic Man* (1961). The "consumer perspective" simply insists that the most valid judgment which can be given about institutions is given by those people whom they are intended to serve—i.e., the "consumer" of that institution's services; in this case, black students of segregated schools.

If schools are identifiably "black" or "white," if they are more than "just schools," *Green* v. *County School Board of New Kent County*, 391 U.S. 430, 442 (1968), the injury so zealously to be guarded against under *Brown* occurs. And the identifiability of schools, together with the resultant injury occasioned by them, is largely a matter of a child's perception. If a child can say (or see or feel) "This is one of Richmond's black schools—and this is one of Richmond's white schools," the school is, within the meaning of *Brown* and its progeny, a segregated school.

Given the factual context of this case, a child attending any metropolitan Richmond school knows whether his school is a white one or a black one. He also probably lives within a half hour of the center of the city. Either his parents or his neighbor's parents work within the city limits. No matter where he lives in the metropolitan area, the child will go to the hospital in the center of the city if he is ill, and his parents are likely to go into the city center for entertainment. There are no definite natural

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ographical boundary lines which divide up the city, and e political lines constantly shift with each new annexion. The only clear physical demarcation between varis parts of the metropolitan area is that people living ar the center of the city are predominantly black and ople living further away are predominantly white; or, put it in terms of the child's perspective—people living ar the center attend "black" schools, and people living rther away attend "white" schools.

The population of the metropolitan Richmond area is proximately 33% black and 67% white, and this ratio s remained fairly constant over the past decade. If a ild were in a school with a similar proportion of black d white students, he would not perceive it as "black" "white" but as reflecting the metropolitan Richmond ciety in which he lives. Thus, if we assume that only hools with student bodies of 20-40% black would reflect chmond society and thus would not be identifiable by e child as a "white" school or a "black" school, all the gh school students and 90% of all elementary and middle hool students attend schools in the metropolitan Richnd area identifiable by them as "black" or "white." The cial cohesiveness of the metropolitan area and physical oximity further assure such identification. Often high hools with a student body which is more than 75% black e located within four miles of high schools which are re than 80% white.

The black child, the "consumer," who attends schools Richmond perceives well enough that the schools are her "black" or "white" schools. And it cannot be said t the child's perception is incorrect. The State of Virnia has historically used every means within its control

to assure whites that their schools will remain white and to convince blacks that they will never attend any but black schools. Given this history, the State's latest refusal to desegregate its schools effectively is hardly surprising. Thus, until the remedial hearings in this case were pending, Virginia could and often did ignore political subdivision boundaries in setting up school districts. And the State exercised this power for every reason conceivable, including the furthering of segregation. When it was suggested that Virginia again exercise this power, but now to aid desegregation, the State responded by legislation purporting to divest itself of authority to act.

Nineteen years after *Brown,* not only today's black school children but their parents who were themselves school children in 1954 cannot help but understand full well the State's position when they take their children to one of "Richmond's" black schools. Despite promises, claims and hopes to the contrary, nothing can more eloquently remind them of "their place" than escorting their child to a school that remains what it always was—a black school designed to serve black children.

When almost every school in an area can be seen to be a "black" school or a "white" school, it is obvious that the schools are segregated. That this segregation is caused by the state's maintenance of evanescent boundaries does not alter the child's perception, his injury or the segregation. Indeed, plaintiffs produced a number of witnesses to testify to the actual educational harm done by this separation of the races. However, such evidence should not have been necessary because this Court has recognized for almost two decades that "Separate educational facilities are inherently unequal." *Brown* v. *Board of Education, supra,* 347 U.S. at 495.

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II.

The State of Virginia has denied plaintiffs the equal protection of the laws.

A. *The State Has Created the Segregated School System.*

State law creates and defines the boundaries of cities and counties. Such boundaries are often useful for the administration of many matters, but they need not coincide with school division boundaries. In fact, when this suit was instituted, there were a number of school divisions which included several political units in Virginia, and Virginia law permitted the State Board to consolidate school districts even if consolidation overlapped such political lines. Metropolitan school districts overlapping political lines are not uncommon elsewhere. For example, the City of Charlotte, North Carolina, and the County of Mecklenburg comprise a single school system. See *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971). Nevertheless, after institution of this litigation, Virginia state law was changed and now requires the State Board to divide the state into school divisions according to county and city boundary lines, unless the school boards and governing bodies of the political units affected agree to a joint school division. Va. Code sec. 22-30. To the extent that the State has delegated to local officials the power to determine the boundaries of the administrative units for schools, the exercise of those powers is still the State's responsibility and they must be exercised in conformity with the state's constitutional obligations. Regardless of the legal mechanism the result of that exercise of power in this case is clear—segregated schools. Having

created a segregated school system and having refused to exercise that power in a manner that would desegregate it, the State of Virginia and the Counties of Henrico and Chesterfield and the City of Richmond have violated their constitutional duty under the Fourteenth Amendment.

The question in this case, therefore, is not whether state action has resulted in a segregated school system—that clearly has occurred. Rather, the question is, having acted in such a manner as to segregate the races in fact, can the State demonstrate justification of a sufficiently compelling nature so as to excuse the effects of its actions? If such justification does not exist, then the school system is segregated within the meaning of *Brown* and the equity powers of the District Court below were properly applied to remedy the resultant segregation.

The Court of Appeals did not discuss this question. Applying the wrong legal rules, they instead deemed the relevant question to be the existence or non-existence of "racial motivation" or "segregative intent" as an explanation for the Respondents' behavior. This was error.

B. *The School Boundary Lines Are Unconstitutional Because They Operate to Discriminate on the Basis of Race and Are Not Justified by a Compelling State Interest.*

Although there are sometimes no obvious criteria for drawing lines, it is still useful to draw a line. This is the case with the political boundary lines in the Richmond area. There are no natural geographical boundaries dividing the area, and the lines which are imposed are flexible and subject to constant change through annexation proceedings. These lines are drawn to facilitate various political and social functions. But the criteria on which the lines are

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based are arbitrary, at least in the sense of whimsical. Such arbitrary lines are properly viewed with suspicion when their effect is to disadvantage blacks. Thus, courts have not permitted school attendance lines to be drawn around a residentially segregated neighborhood when other attendance zones are just as feasible. *Brewer* v. *School Board of City of Norfolk*, 397 F.2d 37 (4th Cir. 1968). Even attendance zones which follow natural or historical boundaries have been struck down when they operate to separate the races. See *Henry* v. *Clarksdale Municipal Separate School District*, 409 F.2d 682 (5th Cir.), *cert. denied*, 396 U.S. 940 (1969); *United States* v. *Greenwood Municipal Separate School District*, 406 F.2d 1086 (5th Cir.), *cert. denied*, 395 U.S. 907 (1969); *Clark* v. *Board of Education of Little Rock*, 426 F.2d 1035 (8th Cir. 1970); and *Monroe* v. *Bd. of Comm'rs of Jackson*, 427 F.2d 1005 (6th Cir. 1970). See also *Davis* v. *Board of School Commissioners of Mobile County*, 402 U.S. 33 (1971).

If the effect of the line drawing is racial segregation and the justification is weak, there is no need to probe the psychological motivation of a legislature and determine whether there was in fact a racial purpose. Anyone involved in such a classification will readily perceive that they are treated unequally, and courts will agree with the perception. See *Jackson* v. *Godwin*, 400 F.2d 529 (5th Cir. 1968); *Hawkins* v. *Town of Shaw*, 437 F.2d 1286 (5th Cir. 1971).

Where the effect of a classification is to separate the races, persons subject to the classification are likely to be severely harmed regardless of whether the classification was overtly on racial grounds or not. They should not be put to the burden of demonstrating an actual racial mo-

tive, intent or purpose. Further, it may prove impossible to prevent deliberate racial discrimination if the discriminator need only cite some rational basis not directly and obviously connected with race to support his action. Individuals and states then need only search for a slight apparent nonracial basis to continue segregation as before. Unless the state is forced to demonstrate substantial reasons for action which has a racial effect adverse to minority group members, the state can continue a policy of segregation behind a facade of neutrality.

This Court has construed statutes prohibiting racial discrimination in voting and employment from this perspective. See *Gaston County* v. *United States,* 395 U.S. 285 (1969). In *Griggs* v. *Duke Power Co.,* 401 U.S. 424 (1971), an employer used a standardized test for hiring and promotion decisions. The district court found there was no racial purpose or invidious intent in adopting the test although whites generally did better than blacks in taking it, and by a split decision the Fourth Circuit Court of Appeals affirmed. Nevertheless, this Court found that the use of the test violated Title VII of the Civil Rights Act of 1964 which made it unlawful for an employer "to limit, segregate, or classify his employees in any way which would deprive . . . any individual of employment opportunities . . . because of such individual's race." The Court ruled that an employment test could be used only if it was in fact related to performance of the job, and that the employer's motive in using the test was not the significant question.

The issue in cases of racial discrimination thus at least becomes whether the classification or boundary line that operates to discriminate against blacks is justified by a

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compelling non-racial state interest. See e.g., *Loving* v. *Virginia*, 388 U.S. 1, 9 (1967); *McLaughlin* v. *Florida*, 379 U.S. 184 (1964).

In the instant case, when effect rather than "intent" is considered, and when Virginia's professed "justifications" are weighed to determine their compelling nature, it becomes clear that consolidation of these school districts is not beyond the remedial powers of a federal district court. Indeed, as Judge Winter pointed out in dissent below, this case is but the "obverse of the same coin" presented in the companion cases of *Wright* v. *City of Emporia*, 407 U.S. 451 (1972) and *United States* v. *Scotland Neck*, 92 S. Ct. 2214 (1972). There, as here, the Court of Appeals below applied the incorrect test—"segregative intent." In those cases the Court of Appeals permitted one district to be "split" into two school districts, ignoring all the while the segregative effects of such splitting. There, as here, focus on "segregative intent" rather than on "effect" led the Court of Appeals to conclude that no constitutional deprivation resulted despite demonstrable segregative effect. This Court reversed, holding that effect, not intent, was the proper test and that choice of a less effective alternative to desegregate schools in the face of available and proven effective alternatives placed a heavy burden of justification on the state. There, as here, no such compelling justification can be professed.

Whatever the State of Virginia's interest in maintaining the political boundary lines of Richmond City, Henrico County and Chesterfield County, it has no compelling interest in utilizing those lines for school administrative zones which result in segregated schools.

First, the State ignored political boundary lines to implement its earlier policy of segregation. From 1940 through 1968 at least four regional all-black schools were operated in the State. During this period many Virginia children were bused across county lines because the nearest school of their race was located in another county. Further, the State's tuition grant system enabled children to transfer out of their county school into one elsewhere, even in another state, where the children were of the same race.

Second, political boundary lines have often been ignored in the past to further other educational purposes. Richmond, Henrico and Chesterfield have cooperated in a training center for mentally retarded children and, with two other counties, in operating a mathematics-science center. On January 3, 1968, the State Board of Education resolved that "effective consolidation of school divisions is a prerequisite to quality public education in many areas of the state." Bedford County and Bedford City were thus allowed to form a single school division. Fairfax City and Fairfax County, while remaining separate school divisions, operate together under a contract with the County educating the city children.

The historic practice of combining several political subdivisions into one school division demonstrates that there is no compelling reason to maintain separate school districts and that the State of Virginia has not in the past considered the reasons offered in this case to be "compelling." Separate districts are clearly not necessary to give residents a voice in the education of their children. Nor are they necessary to assure the taxpayer that his money is being used for schools which his children attend.

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contract method of joint operation would also assure taxpayer that his moneys went to the education of his dren. Since there is no compelling reason to maintain e school boundary lines which separate children by , they should be struck down.

The State Cannot Use Political Boundary Lines to Limit the Federal Courts' Remedial Power Because the State Has Caused the Division of the Races by Those Lines.

irginia has for many years operated a dual system in the schools of the state. "Because they are Negroes, tioners have long received inferior education in seg- ated schools, and this Court expressly recognized these erences in *Gaston County* v. *United States.*" *Griggs* v. *e Power Co.*, 401 U.S. at 430. As the trial judge ted out in this case, inferior education leads to re- ted job opportunities; unskilled employment leads to ricted ability to choose a home. Thus, the segregated ols of the past started a pattern which largely re- ts blacks to the center of the urban area. Assuming efore that there was no significant racial distinction n the boundary lines were drawn, the state policy of egated education throughout most of this century has ed create the racial division which the lines now mark.

egregated schools also contributed to the present pat- s of residential segregation in other ways. "People vitate toward school facilities, just as schools are lo- d in response to the needs of people. The location of ols may thus influence the patterns of residential de- pment of a metropolitan area and have important im- on composition of inner city neighborhoods." *Swann Charlotte-Mecklenburg Board of Education,* 402 U.S. 0-21.

The State of Virginia contributed to the creation of residential segregation in many other ways as well. The State for many years enforced restrictive covenants, thereby encouraging people to impose them on the land to such an extent that much of the land in the metropolitan Richmond area today has restrictive covenants in earlier deeds. Notation of such a covenant was still common in title searches until within the last few years, even though the covenant could not be constitutionally enforced. Public housing was sited and occupied on the basis of race until recently. The counties provided schools, roads, zoning and development approval for the rapid growth of the white population in the county at the expense of the city, without making any attempt to assure that the development it made possible was integrated.

Even when state law no longer required absolute racial separation in the schools, and the massive resistance of Virginia to the court orders in *Brown* v. *Board of Education* had diminished, schools were still sited to produce segregation. As the trial judge found, "Construction in both counties has tended to correspond with the development of white and black residential areas, and in fact was so intended. . . . New construction was planned for black schools in the county without regard to the possibility of accommodating an expanding black pupil population in white schools." These acts in furtherance of segregated schools are within the power of the district court to correct. See *Swann* v. *Charlotte-Mecklenburg Board of Education, supra.*

The State ignored the boundary lines dividing the city from the counties in pursuing a policy of school and resi-

dential segregation which ultimately drove the blacks into the city and the whites into the counties. It should not be permitted to use a boundary ignored to create segregation in order to frustrate remedial measures for the earlier segregation. See *United States* v. *Indianola Municipal Separate School District,* 410 F.2d 626 (5th Cir. 1969).

It is encouraging to the principles of the Fourteenth Amendment that the state has not by its policies made integration impossible. The order of the trial judge demonstrates that feasible remedial measures can be implemented. See *Swann* v. *Charlotte-Mecklenburg Board of Education, supra.* The area involved is not so great nor is the additional transportation so significant as to hamper the education process if this Court affirms the consolidation order. Indeed, it is noteworthy that the strongest resistance to this order comes from the counties (the City of Richmond is a party plaintiff) where busing is commonplace because of the lower population density. But State-created segregation should not be tolerated, especially where its justification lies in arbitrary lines whose specific location serves only to mark off areas according to race. Nor should the mandate of the Constitution be circumvented because of any public outcry over court orders. See *Cooper* v. *Aaron,* 358 U.S. 1 (1958).

CONCLUSION

For the reasons stated in this brief, as well as in the opinion of the district court below, the judgment of the court below should be reversed.

Respectfully submitted,

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